

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1011 B
MS

Submitted by
Frederick H. Block

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

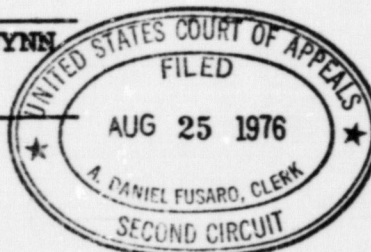
-against-

JOHN GWYNN,

Defendant-Appellant.

-----x

BRIEF FOR APPELLANT JOHN GWYNN
ANDER'S versus CALIFORNIA



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New York, N.Y. 10022
(752-4433)

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Frederick H. Block

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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UNITED STATES OF AMERICA,

Plaintiff-Appellee

-against-

JOHN GWYNN,

Defendant-Appellant.
-----x

BRIEF IN SUPPORT OF COUNSEL'S
APPLICATION FOR PERMISSION TO
WITHDRAW.

Statement

This brief is submitted pursuant to the ruling of the United States Supreme Court in Anders vs. California, 386 U.S. 738 (1967) in support of counsel's application to withdraw. The ground of the application as demonstrated herein is that there is no meritorious basis for appeal.

Statement of the Case

The Background.

Gwynn was convicted after trial with co-defendants Magnano, Pallatta, Bolella, DeLutro, Soldano and Lucas before

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Hon. Irving Ben Cooper and a jury in the Southern District of New York on narcotics charges. He was found guilty on three of the five counts which had been levelled against him in the indictment, to wit, a charge of conspiracy to violate 21 U.S.C. sections 812, 841 (a) (1) and 841 (b) (1) (A) (count 1) and two substantive counts. The first substantive count (count 10) charged him with possessing with intent to distribute approximately a quarter of a kilogram of heroin in or about March 1973 in violation of 21 U.S.C. sections 812, 841 (a) (1) and 841 (b) (1) (A). The second substantive count (count 16) charged him with distributing and possessing with intent to distribute 148.5 grams of heroin in violation of the same statutes and the aiding and abetting statute (18 U.S.C. sec. 2).

The jury disagreed as to count 14 which charged Gwynn with distributing and possessing with intent to distribute 159.5 grams of cocaine on or about October 30, 1973 and as to count 15 which charged Gwynn with the same violations involving 151.5 grams of cocaine on December 30, 1973.

Gwynn was sentenced to 8 years on each count to be

followed by three years' special parole to run concurrently and is presently serving his sentence at Lewisburg.*

Gwynn appealed along with his co-defendants but his appeal was dismissed, presumably for failure to prosecute, on April 18, 1976. His appeal was subsequently reinstated on May 18, 1976 at which time the undersigned was appointed as his counsel under the Criminal Justice Act.

In the meanwhile, his co-defendants prosecuted their appeals which were argued on May 5, 1976 before Circuit Judges Mulligan and Hays and District Judge Palmieri and are pending for decision.

The undersigned has studied the record in this case and has studied the briefs of all the parties on the co-defendants' appeals including the government's brief. It is on the basis of that study that counsel has concluded that there is no merit in Gwynn's appeal.

The Difference Between Gwynn's
Case and that of his Co-Defendants.

Gwynn alone among all of the defendants in the case

*The maximum on each count was 15 years imprisonment and a \$25,000 fine or both. 18 U.S.C. Secs. 841(1) (A) and 846.

was convicted on direct evidence of dealing in a substantial amount of heroin. As hereinafter appears, the evidence of Vasquez and of DEA agents Simpson and Kobell proved the sale of a substantial amount of heroin by Gwynn on January 15, 1974 in support of count 16 of the indictment. In view of this proof that count would have to be sustained. Therefore, even if error were to be found with respect to the conspiracy count and count 10, Gwynn would not be benefited in light of the fact that the terms of imprisonment imposed on him were to run concurrently.

The Proof as to Count 16

Vasquez, an ex-convict, testified to arrangements he had made with one Finn, an informant, for purchases of cocaine for Finn from Gwynn in October and December 1973. In connection with the supposed cocaine deal in December 1973, Finn introduced an undercover agent by the name of William Simpson to Vasquez as "Bill" in mid January, 1974 (Tr.1666-1667).

Subsequently and around the middle of January 1974, according to Vasquez, Vasquez met Finn who said that Bill had returned from Puerto Rico and was interested in getting an eighth of heroin (1678). Vasquez thereupon talked to Gwynn

and eventually was told that the deal could be made for \$6,000 (1679).

Vasquez then met with Finn and Bill and drove to the vicinity of Gwynn's apartment house (1685). On arrival, Finn gave Vasquez \$6,000 after which Vasquez went to Gwynn's apartment where he obtained the heroin and then returned to the car where he turned it over to Finn who gave it to Bill (1686-1689).

While visiting Gwynn, Vasquez had noted that there was a man on the landing. He learned subsequently that the man was DEA agent Kobell (1688, 1737).

Agent Simpson testified in corroboration of Vasquez. He told about receiving \$6,000 in government funds, driving with Finn and Vasquez to the vicinity of Gwynn's apartment house and to obtaining the package of heroin (1762, 1766-1768). He identified the package which was received in evidence without objection (GX 52, 1770-1771).

Agent Kobell also testified that on January 15, 1974 he was maintaining a surveillance on the fifth floor of Gwynn's apartment house. He heard the buzzer sound after which he observed that the door of Gwynn's apartment, 5 C was opened and left ajar. He then saw Vasquez get off the elevator.

Kobell left the fifth floor and went to the sixth floor after which he returned to the fifth floor. On returning he saw that the door of Gwynn's apartment was closed. After fifteen minutes he saw Vasquez and Gwynn emerge from the apartment (1831-1836).

The Other Evidence Against Gwynn

1. As to the Conspiracy Charge.

Gwynn was linked to the conspiracy charge principally by the testimony of Perna and Verzino. Perna, who had gone into the narcotics business with Ernest Malizia in February 1973 (Tr. 453-454), testified that Gwynn was a substantial customer on a regular basis (Tr. 539, 553, 572).

Verzino who became a partner of Perna and Malizia in late August or September 1973 (Tr. 1871-1872) also described Gwynn as a customer (Tr. 1877, 1897-1900).

Records maintained by Perna, Malizia and Verzino included coded versions of Gwynn's telephone numbers as well as entries showing amounts owed by Gwynn from time to time for narcotics (GX 1, 2, 9, 36, 45).

In addition to the foregoing, Agent Salvemini testified that in January of 1973 he was operating undercover (Tr. 1620) and met Gwynn at a bar. There was a discussion

about a purchase of heroin. Gwynn said he had 10 kilograms of heroin available at a price of \$40,000 per kilo. The agent said he would be interested in one kilo. Arrangements were made to consummate the transaction the following night but no meeting was had and the transaction never took place (Tr. 1626-1630).

2. As to Count 10

Count 10 charged Gwynn with possessing with intent to distribute a quarter of a kilogram of heroin in March 1973. His conviction on that count was apparently based on the testimony of Perna. That witness testified to a sale and delivery of a half kilo of heroin to Gwynn for \$15,000 (Tr. 502-507). This was in March 1973 after Perna and Malizia had made a connection for heroin (Tr. 475 et seq).

The Defense Case

Gwynn testified in his own defense. He acknowledged knowing Perna and Vasquez from prison where he had served time on a manslaughter conviction (Tr. 3540, 3542).

He testified that Perna came to see him in 1972 with Ernest whom he knew from prison, but only by his first name. They asked him if he wanted to deal in narcotics. He refused

saying that he was on parole. Perna was indignant and called him a stupid Puerto Rican (Tr. 3547, 3551-3552).

In late 1973 or early 1974 he was again approached with a similar proposition by Perna and Verzi. He again refused. Thereupon Perna "told me that I was going to get mine". (Tr. 3553-3554).

Gwynn also testified that Vasquez had approached him about a cocaine deal which he refused (3558).

Gwynn denied any involvement with narcotics with Perna, Verzino and Vasquez in 1973 and 1974 and called Vasquez a liar with respect to his testimony about the heroin transaction in January 1974 (3587).

In the course of his testimony Gwynn admitted that he was known by the nicknames of Johnny Q. and J.Q. (Tr. 3561) which had been attributed to him by Perna and Vasquez. He admitted having the same telephone numbers in 1973 and 1974 which had appeared in the records of Perna, Malizia and Verzino (Tr. 3581-3582).

He was impeached on his denial that he had ever been self-employed and on his denial that he owned an after-hours club. Gwynn's application for unemployment insurance benefits

filed on July 29, 1975 was received in evidence (GX 110) along with his application for a lease dated August 26, 1975 wherein he described himself as self-employed at an after-hours club (GX 112, 3597).

Discussion

As to Count 16

The crucial evidence as to count 16 was adduced from Vasquez and agents Simpson and Kobell without objection. Accordingly, since the weight of the evidence and the credibility of the witnesses are not open to question in this Court, Glasser vs. United States, 351 U.S. 60 (1942) it must be concluded that the conviction was justified by the substantial evidence adduced. It remains to be seen therefore whether error in any other aspect of the case can be relied on to vitiate the verdict.*

The Government Summations

The prosecutor's main summation (Tr. 3686-3774) and his rebuttal summation (Tr. 3981-4022) were unexceptionable as far

*The co-defendants have attacked rulings of the court with respect to certain evidence adduced on the conspiracy charge: e.g. Lucas Br. Points I and II: claim has also been made that the proof indicated more conspiracies than the single conspiracy charged: e.g. Lucas Br. Point III. We do not discuss these contentions since they are irrelevant to Gwynn's conviction on the substantive charge embodied in count 16.

The Court's Charge

The only aspect of the court's charge which has any bearing on Gwynn's conviction on count 16 is the charge on reasonable doubt (Tr. 4044-4046).^{*} The sole exception to this part of the charge was to the failure of the trial judge to have said that a reasonable doubt "is such a doubt as would cause the jury to hesitate to act in matters of importance in their own lives", as suggested in Holland vs. United States, 348 U.S. 121, 140 (1954). But the language used by the trial judge was substantially in line with the charge in United States vs. Acarino, 408 F.2d 512, 517 (2 Cir. 1969) cert. den. 395 U.S. 961 which was held free from error. Cf. United States vs. Nuccio, 373 F.2d 168, 175 (2 Cir. 1967).

Moreover as far as Gwynn is concerned, the fact that the jury disagreed on counts 14 and 15 would seem to indicate that it fully understood the meaning of reasonable doubt.

^{*}The trial judge read the substantive charges to the jury and defined the elements of the crimes and the statute involved (Tr. 4079, 4084-4085, 4085-4088). No exceptions were taken to the charge in any of these respects (Tr. 4122 et seq).

The evidence as to those counts consisted of the testimony of Vasquez and Agents Peterson and Simpson plus the packages of cocaine supposedly sold to Vasquez by Gwynn in October and December 1973 (GX 50, 51). Apparently the dubious background of Vasquez (cf. Tr. 3896) plus the absence of a surveilling agent like Kobell in the heroin transaction involved in count 16, raised enough doubt to prevent a verdict on those counts.

Conclusion

In summary the evidence against Gwynn on count 16 was sufficient to sustain the verdict. No error can be assigned to Gwynn's conviction on that count. Accordingly, Gwynn's appeal lacks merit and counsel's motion for permission to withdraw should be granted.

Respectfully submitted

Frederick H. Block
Attorney for Defendant-
Appellant.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

Arline Levy being duly sworn, deposes and says;
that she is over the age of 18 years, is not a party in
this action and resides at Queens, New York.

On the 29th day of July, 1976 she served a copy of
Brief in Support of Counsel's Application for Permission To
Withdraw on the defendant-appellant at Box 1000, Lewisburg,
Pennsylvania, where he was then incarcerated and upon the
United States Attorney for the Southern District of New York,
attorney for plaintiff-appellee at 1 St. Andrews Plaza,
New York, N.Y. by enclosing the copies in a properly addressed,
postpaid wrapper; depositing same in a depository maintained
by the United States post office within the State of New York.

Sworn to before me this
29th day of July, 1976.

Arline Levy

Frederick H. Block

FREDERICK H. BLOCK
Notary Public, State of New York
No. 31-0322734
Qualified in New York County
Commission Expires March 30, 1977

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-against-

JOHN GWYNN,

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BRIEF IN SUPPORT OF COUNSEL'S
APPLICATION FOR PERMISSION
TO WITHDRAW

FREDERICK H. BLOCK

ATTORNEY FOR Deft.-Appellant

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